BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BENNIE L. KENT	)	
Claimant	)	
VS	)	
	)	
SUMMIT DRILLING, INC.	)	
Respondent	)	Docket Nos. 250,939
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent appealed Administrative Law Judge (ALJ) Robert H. Foerschler's Award dated June 26, 2001. The Appeals Board (Board) heard oral argument on January 23, 2002.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for the claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent and its insurance company.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

1. Did respondent have probable cause to administer a drug test following claimant's work-related accident?

2. Did claimant's marijuana consumption contribute to his work-related injury?
3. What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a work-related scheduled injury on November 15, 1999, when a pipe fell and struck his hand. In addition to 12.57 weeks of temporary total disability benefits and payment of medical expenses, the ALJ also awarded claimant permanent partial disability compensation for a 20 percent loss of use to the left forearm. On appeal, respondent first argues that the ALJ erred by awarding claimant workers compensation benefits in light of K.S.A. 1999 Supp. 44-501(d)(2) which provides in relevant part:

> The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.

The results of a drug test conducted contemporaneously with the accident revealed a THC level of 399, and medical testimony based on the test results supports that claimant was impaired when he was injured. There is also medical testimony based on the test results to support that claimant's impairment contributed to his injury.

However, K.S.A. 1999 Supp. 44-501(d)(2)(A) specifically provides that the results of a drug test are not admissible to prove impairment unless "[t]here was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working." In other words, in order for respondent to be entitled to a defense under the statute based on the results of a contemporaneous drug test, the evidence of record must establish that respondent had probable cause to believe that claimant was impaired by marijuana when he was injured. As this was not proven, the Board finds that the ALJ did not err in determining that the results of claimant's drug tests and derivative evidence were inadmissable under K.S.A. 1999 Supp. 44-501(d)(2)(A).

Respondent argues "that the totality of the credible evidence herein establishes that respondent had probable cause to administer a urine drug screen to claimant following his

accident based upon his voluntary statements to his supervisor." [1] After the accident and injury, claimant informed his supervisor in what the supervisor perceived as a serious manner that the supervisor would need to "piss in a bottle" on claimant's behalf. According to respondent, "this statement alone raised concerns" in the supervisor's mind "regarding claimant's possible impairment on the job." [2]

The Workers Compensation Act does not define probable cause. Nevertheless, the Board has previously held that "the phrase means having sufficient information to lead a reasonable person to conclude that there is a substantial likelihood that drugs or alcohol were either used by or impaired the injured worker." [3]

The Board adopts the definition of probable cause announced in *Evans* and concludes that K.S.A. 1999 Supp. 44-501 (d)(2)(A) requires the trier of fact to determine the existence of probable cause by looking at the facts known by respondent at the time respondent requested the drug screen. If those facts do not establish probable cause to believe the injured worker had been using drugs or was impaired at the time of the accident, the results from the drug screen are inadmissible.

Here, the evidence fails to establish that respondent had probable cause to believe claimant had used, had possession of, or was impaired by drugs or alcohol while working. Instead, the preponderance of the evidence establishes that claimant's supervisor simply interpreted claimant's statement as an indication that he would not pass a drug test.

Claimant smoked marijuana the night before his accident. He was aware of respondent's mandatory drug testing policy following any work-related injury. But other than claimant's statement, claimant's supervisor did not observe any behavior on claimant's part indicative of drug use or impairment before the accident. The supervisor testified that claimant was not staggering when he arrived at work and did not have any problem climbing a ladder. Moreover, contrary to respondent's assertions, the supervisor testified that he did not feel claimant was impaired in any way. He specifically stated that his only thought was that claimant might be concerned about passing a drug test.

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[1] Respondent's Brief at 12 (filed Aug. 13, 2001).

[2] Respondent's Brief at 15 (filed Aug. 13, 2001).

[3] *Evans v. Frakes Trucking,* No. 234, 610, 2001 WL 16669673 (Kan. WCAB Nov. 20, 2001); (affirmed by the Kansas Court of Appeals in an unpublished Memorandum Opinion filed Oct. 4, 2002, Case No. 88,150, 54 P.3d 981); *see also Lindenman V. Umscheid,* 255 Kan. 610, 875 P.2d 964 (1994) (probable cause means "reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person in the belief that the party committed the act of which he or she is complaining); *In re Estate of Campbell*, 19 Kan. App. 2d 795, 876 P.2d 212 (1994) (probable cause is "the existence of evidence . . . which would lead a reasonable person, properly informed and advised, to conclude. . .").

Therefore, the Board finds that respondent did not possess sufficient information to lead a reasonable person to conclude that there was substantial likelihood that drugs or alcohol impaired the injured worker at the time of his work-related accident. As a result, the Board finds that the ALJ correctly determined that claimant's drug screen results and evidence derivative therefrom were inadmissible. In addition, as found in the Board's June 14, 2000 preliminary hearing Order, "the accidental injury would have occurred regardless of any level of impairment." As such, the record fails to establish that impairment contributed to the accident. In light of this determination, the Board further finds that respondent's related arguments regarding compensability are moot.

Additionally, the Board also finds that claimant's statement cannot, as a matter of law, form the basis of respondent's probable cause determination. The Kansas legislature placed the probable cause requirement in K.S.A. 1999 Supp. 44-501(d)(2)(A) for a reason. A drug test is an invasive procedure, and an injured worker's privacy rights are at stake. Although the statute provides that probable cause be contemporaneous with the testing, the Board believes that the probable cause requirement makes sense only if it is present before an employer demands drug or alcohol testing. Under the circumstances of this case, the Board finds claimant's statement to his supervisor did not precede respondent's demand that he undergo a drug test and cannot therefore form the basis for probable cause.

Claimant's drug test was required because it was respondent's mandatory procedure to test for alcohol and drugs whenever an employee was injured at work. Because claimant was aware of this policy, the policy itself amounted to respondent's demand that claimant submit to a drug test once he suffered an accidental injury. Claimant's statement was a reaction to this demand. Therefore, claimant's utterance cannot form the basis for probable cause to demand he submit to a drug test because claimant's statement was uttered in response to respondent's demand. The fact that drug screens may be required because of company policy or other statutory provisions may be significant for personnel or other actions unrelated to a workers compensation claim. However, such requirements cannot be a substitute for the specific statutory requirement of probable cause mandated by K.S.A. 1999 Supp. 44-501(d)(2)(A). Under the Workers Compensation Act, the probable cause must be established independently from a mandatory testing policy.

Respondent also requests the Board to modify the ALJ's award to provide for permanent disability compensation based on Dr. Mark Melhorn's opinion as opposed to Dr. Pedro Murati's opinion. The Board declines to do so. At the regular hearing, claimant complained of ongoing problems with his left upper extremity, including poor grip strength, lost finger control, poor arm strength, and limited range of thumb and wrist motion. Dr. Murati's impairment rating is more consistent with claimant's testimony about his residual symptomatology. Thus, the Board finds that Dr. Murati's opinion coupled with claimant's

testimony prove that claimant sustained a 20 percent left upper extremity impairment as a result of his compensable injury.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that Administrative Law Judge Robert H. Foerschler's June 26, 2001 Award should be, and the same is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of December 2002.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

Dissent

The undersigned Board Member would find that respondent established probable cause to believe claimant had, had possession of, or was impaired by drugs or alcohol while working. Claimant's comments to Harold Beck, his supervisor, alerted Mr. Beck to possible alcohol or drug use by claimant. Mr. Beck testified that when claimant made that comment to him about his have to "piss in the bottle" for him, it indicated that claimant was hiding something.

Probable cause, as defined by the majority in its opinion, means "reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person in the believe that the party committed the act at

which he or she is complaining." [4] In this instance claimant's comments were sufficiently strong to cause concern on Mr. Beck's part and would alert a cautious person to the possibility that claimant had partaken of some illegal activity which would cause his urine test to come back positive. Mr. Beck's conclusion that "claimant had something he was hiding" was a reasonable conclusion under the circumstances and would constitute probable cause in this instance. Additionally, the Board's requirement that probable cause be established independent from a mandatory drug testing policy is not a requirement contained in K.S.A. 44-501.

In this instance this Board Member would find the comments made to claimant's supervisor would constitute probable cause under K.S.A. 44-501 and the test results showing claimant's "extremely high" level of THC should be considered.

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BOARD MEMBER

c: Jeffrey K. Cooper, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Director, Division of Workers Compensation

[4] Lindenman at 624.